90-1631

No. _____

Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

MURRAY WILSON and SAM WATENSTEIN,
Petitioners,

-v-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the petitioners were stripped of their Sixth Amendment right to present a defense of their choice when the government, without justification, failed to execute the arrest warrants that had been isued by the court to secure the testimony of these defense witnesses who, although properly subpoenaed by the defense, disregarded the mandate of those subpoenas by failing to appear as required.

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-*v*-

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, affirmed petitioners MURRAY WILSON'S and SAM WATENSTEIN'S conviction on January 29, 1991 (said order is set forth in Appendix A).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioners, Wilson and Watenstein, were charged in a three count indictment with the crimes of mail fraud (Title 18, U.S.C. §1341), wire fraud (Title 18, U.S.C. §1343), and conspiracy to violate these crimes (Title 18, U.S.C. §371). These charges were premised upon allegations that from early 1983 to September 20, 1983, the petitioners perpetrated a scheme to defraud the Dunes Hotel in Las Vegas out of sums of money. The government maintained that in furtherance of their scheme, the petitioners recommended certain individuals to the Dunes Hotel. These individuals were extended credit by the Dunes. Once credit was received, these individuals would obtain chips and give these chips to the petitioners. The petitioners would then arrange for the chips to be exchanged for currency at the Hotel. These individuals did not repay their credit loans to the Dunes Hotel.

The petitioners claimed that, notwithstanding that Wilson recommended certain players to the Dunes Hotel, he had nothing whatsoever to do with extending credit to any of one of these individuals. The Dunes granted credit to players only after the Hotel itself conducted a careful check on these prospective players by requiring them to fill out credit applications and submit to bank checks. Accordingly, the defense maintained that the petitioners bore no responsibility if these players, even if recommended by Wilson, failed to pay their outstanding debts to the Dunes Hotel.[1] Petitioner Wilson further admitted that he did indeed take cash or chips from certain players in satisfaction of past debts to him or because he borrowed chips from friends when the Dunes wrongfully cut off his credit. In short, the defense claimed that no crime was committed.

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[1] It was then the law in Nevada that the Dunes Hotel could not sue these individuals on account of their gambling debts.

The government's case centered primarily on the testimony of ZVI HAGAR. On three separate occasions, Hagar claimed that he traveled to Las Vegas where he cashed in an estimated total of $750,000 in chips pursuant to the petitioners' instructions.[2] Hagar conceded that one of the prime reasons that he was testifying against petitioner Wilson was to obtain revenge for the Secaucus incident in April of 1985, at which time both petitioners accused him of burglarizing Wilson's office, beat him and left him standing naked in the cold in Secaucus, New Jersey.[3] Hagar also admitted telling a New Jersey detective that he would drop the New Jersey charges in exchange for $10,000 from Wilson.

Even after petitioners were indicted in Las Vegas on the present charges, Hagar told his father (Rabbi Solomon Hagar) that he saw this as an opportunity to get money from petitioner Wilson for compensation for the Secaucus incident. Hagar had two meetings with petitioner Wilson. He first told Wilson that if he paid him money, Hagar would not testify against him. At the second meeting, he told Wilson to pay him the specific sum of $30,000 which Wilson agreed to pay. Hagar did not know that Wilson, with the assistance of the FBI in New York, was recording these conversations.

THOMAS DROST, Chief of Security at the Dunes Hotel, was assigned to investigate whether petitioners and the individuals whom he recommended for credit at the Dunes Hotel were involved in a scheme to defraud the Dunes Hotel. In 1983, he interviewed Zvi Hagar, petitioner Wilson and others and concluded in his report that no fraud had been committed. However, two years later, in May of 1985, Drost was contacted by the Hagar family and later met with

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[2] The government could prove only that the petitioners had purportedly recived $47,000 from Hagar and another government witness, Irv Green, and not the $750,000 that was claimed.

[3] A New Jersey grand jury refused to indict either petitioner for these acts.

Zvi Hagar, Rabbi Solomon Hagar, Isaac and Baruch Hagar. Rabbi Hagar initiated the conversation and indicated that he wanted to make sure that something was done with respect to the petitioner Wilson. Following this interview, Drost wrote a report now concluding that there appeared to have been a conspiracy to defraud the Dunes.

THE DEFENSE

An integral part of the defense was premised on the theory that not only was Zvi Hagar a liar, but also that this witness, acting together with his father (Rabbi Solomon Hagar) and his brother (Baruch Hagar), had in fact conspired to frame the petitioners. In order to prove the scope of this conspiracy, the defense required the appearances of both Baruch Hagar and Rabbi Hagar. Therefore, before the trial commenced on June 16, 1989, the defense placed the government and the court on notice that these two witnesses had been subpoenaed, and because they may not appear, the defense was requesting that the court issue material arrest warrants (6/16/89, 7-8). The defense explained that there existed a scheme not only on the part of Zvi Hagar to extort money from petitioner Wilson, but also Rabbi Hagar and Baruch played pivotal roles in this scheme.

According to the defense, the first extortion attempt took place in May or June of 1983 when Rabbi Hagar found a prostitute's telephone number in Zvi's pocket. Rabbi Hagar then warned Wilson "[Y]ou took my son to a city of sin. You have ruined a great family. For this you must pay." Rabbi Hagar then demanded $60,000 from Wilson. A second extortion attempt took place after the reputed Secaucus incident, and a third scheme was attempted to extort money from petitioner Wilson in exchange for Hagar's agreement not to testify at the instant trial.

At that point, the court agreed that the defense was entitled to show bias by this extrinsic evidence. The government likewise represented that they were not disputing that Rabbi Hagar had an

obligation to come to court (6/16/89. 16, 26). That the government understood even before the trial commenced that the defense was alleging that the Hagar family was engaged in a continuing conspiracy to frame the petitioners was shown when the government, in their application to lift the gag order,[4] stated "[W]e obviously have a right to discuss with Zvi Hagar whether or not he was in conspiracy with his father" (6/16/89, 32).)

On June 19, 1989 (the first day of trial), counsel filed the subpoenas with the affidavits showing service on both Baruch and Rabbi Hagar with the court. Counsel again informed the court that these two witnesses were necessary to the defense. Even at this time, the government, too, recognized that these two witnesses were indeed relevant and legitimate defense witnesses when it conceded:

> "Your Honor, certainly. If Rabbi Hagar, and Baruch Hagar were served and they haven't appeared and they are in compliance with the service, I think defendants, *especially in view that there is a bias issue and there is some basis for the witnesses being here, have every right to request an arrest warrant from the court.*" (I-35, emphasis supplied).

Accordingly, the court directed that warrants would issue for the arrest of both Rabbi Hagar and Baruch Hagar. When defense counsel then stated that he was not sure what procedure should be followed with respect to the enforcement of the arrest warrants, the court clerk stated that he would take care of it (I-35).

On June 28, 1989 (the seventh day of trial), counsel complained to the court that the arrest warrants had not been executed by the

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[4] A gag order had been imposed upon the parties by Judge Leavitt restraining them from informing Zvi Hagar that petitioner Wilson had taped his conversations concerning the extortion attempts and that these allegations were being investigated by the FBI in New York.

government concerning Rabbi and Baruch Hagar (VII-7). Counsel then stated that at a minimum they should receive a missing witness charge (VII-7). For the first time, the court ventured that the Hagars may not be relevant witnesses. When counsel protested and claimed that the defense was at least entitled to question Rabbi Hagar concerning the Drost interview, the court responded that "[t]hat may be something of meaning and consequence" (VII-9). Thereafter, the court remarked "I'm not sure that they jury shouldn't be made aware . . . that the Rabbi was subpoenaed and failed to respond to that subpoena. It seems to me that if he was present at the conversation with Drost, that he could be a witness" (VII-19). In response, the government argued that this fact should not be brought to the jury's attention (VII-20).[5]

At 9:15 a.m. on June 28, 1989, after the court ruled that Zvi Hagar could not be recalled as a defense witness, defense counsel stated that "[O]bviously if the court's not going to allow Mr. Hagar to testify, our position would be that we would rest" (VII-27). However, the court stated that in the interim the parties should do some research to determine whether the defense is entitled to a missing witness charge regarding Rabbi's and Baruch's failures to appear at trial (VII-28). Hence, at 9:30 a.m., the proceedings were recessed for the specific purpose of investigating the possibility of the missing witness instruction and was scheduled to be reconvened at 2:15 p.m. that same day, at which time the court's charge to the jury was discussed (VII-29).

Defense counsel first represented that, while they did not find any case law on the particular subject of the missing witness charge, he wanted to inform the court that he had called the Marshall's office once again and asked why the warrant had not been executed. The

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[5] At this point, Zvi Hagar was questioned concerning whether his father was making any efforts to secret himself. Zvi stated that when he was in New York, he had daily contact with his father at home (VII 23-24).

Marshall, Dave Romero, advised him that it was an FBI case and that the FBI had the responsibility of executing the warrant. When counsel said that was news to him the court also exclaimed "[f]rankly, it's news to me as well" (VII-70). Counsel (Mr. Terry) then made the following request:

> "Because Mr. Hagar indicates that he was back home with his father for the last week. There's no doubt the court issued a warrant; there's no doubt we're talking about 7-11 Crown in Brooklyn New York; the problem is that we can't go out and arrest him, it has to be the marshall's office or the FBI or somebody.
>
> I cannot explain to this court why he has not been arrested, and I don't think anybody else can. So the position is that I have to take, as I am requested of the court, continue the trial until Monday, direct the Federal Bureau of Investigation to effectuate an arrest (as the Marshall's office is going to do in reference to Rabbi Hagar) so that we can reopen and put Rabbi Hagar on the stand on Monday, or in the alternative to give the instruction, even though I represent to the court I can't find any case law on that "(VII-71).

At that juncture, the government moved to quash the subpoenas served on Rabbi and Baruch Hagar and also argued that no missing witness instruction should be given to the jury as requested by the defense (VII-72-73). The court ruled first that it would not quash the subpoenas, but that it would deny the defense request for a missing witness charge. For the first time, the court ruled that it had not been convinced that Rabbi Hagar's testimony would be admissible and even if it were, whether it would add anything to the defendants' cases (VII-75).[6]

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[6] The proceedings were concluded at 3:30 p.m. (VII-76).

POST VERDICT PROCEEDINGS

Following the return of the jury's verdict of guilty with respect to both petitioners, the defense filed an application pursuant to Rule 33 of the Federal Rules of Criminal Procedure seeking a new trial. Counsel argued, *inter alia*, that the government's failure to enforce the arrest warrants of Rabbi Hagar and Baruch Hagar deprived the defense of their Sixth Amendment right to produce witnesses in its behalf. A hearing was held on November 22, 1989 to determine if the government was culpable of obstructing the appearances at trial of these witnesses. While the court concluded, after the hearing, that the government was not guilty of any misconduct with respect to the Hagars, testimony was adduced at this hearing by the defense with respect to the government's failure to execute the arrest warrants.

Mr. Terry, counsel for petitioner Watenstein, gave the following uncontradicted account of his efforts to secure the presence of Rabbi and Baruch Hagar at trial:

> "We indicated that the proceedings of the 16th that we had reason to believe that Mr. Hagar — that is Rabbi Solomon Hagar — would not appear nor would his other son. We indicated to the Court that the request for a warrant had really come to fruition yet because the subpoena was not returnable until the first day of trial. But that if he did not appear on the first day of trial, we would request a warrant. We did request a warrant on the very first day of trial, because the subpoena was returnable for 8:30 in this Court. His Honor granted the request. A warrant of arrest was issued.
>
> Hereafter, over the period of time of the trial — on at least three occasions — I spoke to the United States Marshall's office in an effort to find out why the warrant hadn't been executed. Additionally, I had my

> secretary call on other occasions — at least two. And one of the final things that we were advised was that if this was a strike force or FBI case, that it was their responsibility to execute the warrant.
>
> During the course of the trial, we continued to keep the Court advised on at least three occasion (that's my recollection) of what the status of the warrant was. On the final time, when we indicated that we had been advised by the Marshal's service that they felt it was the FBI's responsibility to execute the warrant, that's the way that it was left."(min. of 11/22/89, 18-19).

The evidence at this hearing supported the defense contention that the government did nothing to execute the arrest warrants. Special Agent LARRY MATTHEWS (the case agent) admitted that he took no steps to execute these arrest warrants nor was he instructed to do so by anyone from the government (min. of 11/22/89, 168-169). JANE HAWKINS, the prosecutor, when asked what steps, if any, she took to ensure that these arrest warrants would be executed she stated, "[A]bsolutely none. It is not my responsibility nor was it my responsibility to instruct the FBI to execute the warrants" (min. of 11/22/89, 188). Similarly, ERIC JOHNSON, Assistant United States Attorney, took no steps to execute the arrest warrants for Rabbi Hagar and Baruch Hagar (min. of 11/22/89. 210-203). Significantly, Assistant United States Attorney Paul Wommer acknowledged that he was not aware of any mechanism that the defense counsel has for executing arrest warrants. And most important, Mr. Wommer frankly agreed that the United States government is responsible for the execution of the arrest warrants (min. of 11/22/89, 217).

REASONS FOR GRANTING THE WRIT

THE PETITIONERS WERE STRIPPED OF THEIR SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE OF THEIR CHOICE WHEN THE GOVERNMENT, WITHOUT JUSTIFICATION, FAILED TO EXECUTE THE ARREST WARRANTS THAT HAD BEEN ISSUED BY THE COURT TO SECURE THE TESTIMONY OF THOSE DEFENSE WITNESSES WHO, ALTHOUGH PROPERLY SUBPOENAED BY THE DEFENSE, DISREGARDED THE MANDATE OF THOSE SUBPOENAS BY FAILING TO APPEAR AS REQUIRED.

Neither this Court nor any other federal court has ever addressed the question whether the government is obligated to execute arrest warrants that have been issued by the district court in order to secure the testimony of prospective defense witnesses, who, although properly served with subpoenas, fail to appear and testify. This issue of significant constitutional import, which was raised in a clear and precise manner in the present case, is now ripe for resolution.

This Court has repeatedly expressed the axiom that the accused in a criminal case has the unfettered right to develop his trial strategy by presenting a defense of his own choice to counter the government's evidence against him without interference from the government. *Faretta v. California*, 422 U.S. 806 (1974). Inextricably intertwined with the accused's right to present a defense is his right to offer the testimony of witnesses and to compel their attendance at trial. *Washington v. Texas*, 388 U.S. 20 (1967). Although the petitioners in this case did everything they could have possibly done to secure the testimony of defense witnesses at their trial by subpoenaing these prospective witnesses, these witnesses (Rabbi Solomon Hagar and Baruch Hagar) failed to obey the lawful mandate of their subpoenas. Accordingly, because both the district court and the government acknowledged that these witnesses were relevant to the defense, the trial court at the commencement of the

trial directed that arrest warrants be issued to secure the presence of these witnesses on behalf of the defense. Significantly, pursuant to defense counsel's inquiry regarding the procedure he should follow once the arrest warrants were issued, the court clerk assured counsel that he would "take care of the matter."

Nevertheless, the government did nothing whatsoever to execute these warrants. The FBI claimed that it was the responsibility of the Marshall's office to execute the warrants while the Marshall's office laid the responsibility at the door of the FBI. Despite the fact that the government, in its brief to the Ninth Circuit, conceded that the United States Marshall had an obligation to make a good faith effort to execute the warrants in a timely fashion, not a single step was taken by any government agency to execute these warrants. The bottom line is that the United States government was derelict in failing, without any reason, to execute these warrants. By the government's failure to fulfill its lawful function the defense was stripped of its Sixth Amendment right to secure witnesses in its behalf.

There is no question that if the government wishes to secure the appearance of a particular witness in its behalf, it would encounter no difficulty in obtaining the assistance of either the FBI or the United States Marshall's office to enforce any arrest warrants issued by the court. The defense, however, has no such power. It must necessarily rely on the government's willingness to execute any such arrest warrant. Where the government has failed to act without good reason (or, as here, without any reason) and the defense is thereby thwarted in its efforts to produce witnesses in its behalf, it must be found that there is a *per se* violation of the defendant's Sixth Amendment right to mount an effective defense. Any holding to the contrary would result in making the task of the defense in securing the presence of witnesses far more onerous than that of the government.

Recognizing the importance of the petitioners' Sixth Amendment claim, the Ninth Circuit acknowledged that:

> "We are troubled by the fact that the bench warrants were never executed in this case. The Hagers were hostile witnesses whose presence could not be secured without the government's assistance. Since appellants could not secure the cooperation of the witnesses, it was understandably difficult for them to make a clear showing as to the content, competence and relevance of the testimony, and we would be inclined to afford some latitude in that respect." (A.4a).[7]

The Ninth Circuit, however, rejected petitioners' constitutional claims, holding that because the defense failed to use due diligence in obtaining the Hagers' presence, the district court did not abuse its discretion in denying the defense's requests for a continuance. If the Ninth Circuit's conclusions are validated, the result would be to hold the defense to a more stringent standard in their efforts to secure its witnesses than the government, who would be subject to no such burden. Such an inherently unfair result cannot be tolerated in a system of justice that prides itself on equality and fair play.

Moreover, contrary to the Ninth Circuit's view, the Sixth Amendment issue in this case cannot be transformed into an issue of whether the district court abused its discretion in refusing to grant a continuance. This is not a case where there was any issue concerning the propriety of a continuance. When the district court

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[7] Nonetheless, the defense, in fact, made a clear showing of the relevancy of these witnesses' testimony. The defense had every right to prove that Zvi Hager, the government's star witness, and his family were engaged in a conspiracy to frame them. The defense also had every right to question the Hagers concerning the all-important Drost interview, which served as the catalyst for the ensuing indictment.

first granted the defense permission to continue the case over the weekend in an attempt to secure the subpoenaed witnesses' presence for trial, the defense refused this offer only because they had no way to execute the arrest warrants and any further adjournment would have been futile.[8] Equally important, the district court had not yet decided whether it would issue a missing witness charge concerning the subpoenaed defense witnesses. Such an instruction would have resolved the matter. This occurred at 9:30 a.m. on June 28th. The proceedings were then adjourned to 2:30 p.m. that same day to give the court the opportunity to resolve the issue of the missing witness charge.

It was at that time, only hours later, that counsel moved to reopen the defense based upon his conversations with the Marshall's office regarding why the arrest warrants had not been executed, and with the expectation that the warrants could and would be executed over the weekend. Other than the aforementioned charge conference, nothing took place that would have caused either party any prejudice had the defense been permitted to reopen their case and adjourn the matter over the weekend so that the Hagar witnesses could be produced. Significantly, the district court did not rule that the petitioners were not entitled to a continuance. It was never asserted by the government that the petitioners should not be granted a continuance or that the defense had waived their right to a continuance. The propriety of the defense request for a continuance never even arose and was never considered by either the court or government. The district court denied the request for an adjournment *solely* because it had an inexplicable and sudden change of mind concerning the admissibility of the testimony of

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[8] Interestingly, the district court's initial willingness to grant the continuance to give the defense another opportunity to secure the presence of these witnesses, demonstrates that the district court, even at this late stage of the trial, believed that the testimony of these witnesses was relevant to the defense.

Rabbi Hagar and Baruch Hagar. Because the district court at this time also denied the petitioners' request for a missing witness charge in the afternoon, it became even more critical, in fact, it became vital, that the defense produce these recalcitrant witnesses. Hence, this is not a case involving the appropriateness of a continuance.[9] Instead, the sole question that must be resolved here is the Sixth Amendment issue.

It is also important for Sixth Amendment purposes for this Court to determine whether the Ninth Circuit, in finding that the defense had failed to use due diligence in producing these witnesses, had imposed upon the defense an unrealistic and unreasonable burden on its exercise of this most fundamental constitutional right — a burden that the government in these circumstances does not have to meet in securing its witnesses. Rather, the defense in this case did everything that could reasonably have been expected of it to secure the presence of these witnesses at trial. The defense served valid subpoenas. Even before the trial commenced, the court and the government were informed that these witnesses might well disregard the mandate of these subpoenas. On the first day of trial, when these witnesses indeed failed to appear, defense counsel promptly informed the court and requested that the arrest warrants be issued. After the court issued these arrest warrants, the court clerk assured the defense that the matter would be "taken care of."

Mr. Terry then gave the following uncontradicted account of his efforts to secure the presence of these witnesses at the post verdict hearing on this issue:

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[9] Because the government at trial failed to specifically object to the continuance requested by the defense, they should not be permitted to raise this argument in response to this application. The government must be held to the same standard of waiver with respect to the raising of appropriate objections as is the defense.

> "Hereafter, over the period of time of the trial — on at least three occasions — I spoke to the United States Marshal's office in an effort to find out why the warrant hadn't been executed. Additionally, I had my secretary call on other occasions — at least two. And one of the final things that we were advised was that if this was a Strike Force or FBI case, that it was their responsibility to execute the warrant.
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> During the course of the trial, *we continued to keep the Court advised on at least three occasions (that's my recollection) of what the status of the warrant was.* On the final time, when we indicated that we had been advised by the Marshal's service that they felt it was the FBI's responsibility to execute the warrant, that's the way it was left." [minutes of 11/22/89, 18-19, emphasis supplied].

Mr. Terry was then asked whether he, as an attorney, had any means available to him to execute the arrest warrants. He responded, "[A]bsolutely not. We have done everything possible to effectuate the arrest of the witnesses who had not appeared for the purposes of trial. There was nothing more than we can do". [minutes of 11/22/89, 2].

To sanction the Ninth Circuit's conclusion that the petitioners did not act diligently in attempting to secure the defense witnesses' presence at trial would be to exalt fiction over fact. It would condone the inexcusable failure of the government to execute the arrest warrants so that these defense witnesses would have been available for trial. It would make the defendant's right to produce witnesses a far more onerous burden than that which is imposed on the government. In essence, it would place the defense at the mercy of the government by giving it the sole discretion to decide whether or not to assist the defense in securing its trial witnesses. If the government should determine that these prospective witnesses

might be damaging to its case, they would simply balk at executing the arrest warrants or fail to take any other action as the governement did in this here.

If the Sixth Amendment right of the defense to produce witnesses in its behalf and to mount an effective defense is to be safeguarded, the government cannot be permitted to disregard its lawful function to execute arrest warrants issued by the district court to secure the presence of prosective defense witnesses. The execution of any such warrants should be performed expeditiously and in the same manner as the govement would have done had the arrest warrants been issued to secure the presence of its own witnesses.

Thus, this Court should grant petitioners' writ in order that these vital issues of constitutional magnitude may be resolved.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A– DECISION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

United States Court Of Appeals

FOR THE NINTH CIRCUIT

FILED JAN 29, 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES of AMERICA,
Plaintiff-Appellee,

No. 89-10600
D.C. No. CR-88-141-1-LDG

v.

MURRAY WILSON,
Defendant-Appellant.

UNITED STATES of AMERICA,
Plaintiff-Appellee,

No. 89-10602
D.C. No. CR-88-0141-02-LDG

v.

SAM WATENSTEIN
Defendant-Appellant.

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix A

Appeal from the United States Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted December 10, 1990
Pasadena, California

Before: TANG, FLETCHER, and REINHARDT, Circuit Judges.

Appellants appeal their convictions for mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343 and conspiracy to commit these frauds in violation of 18 U.S.C. § 371. Appellants assert that their sixth amendment right to compulsory process for witnesses in their behalf was violated. They also contend that several of the district court's evidentiary rulings were erroneous and that the evidence was insufficient to support the jury's guilty verdicts. We affirm.

FACTS

The evidence produced at trial established that appellants defrauded the Dunes Hotel and Country Club in 1983 by manipulating the resort's credit policies. Appellant Wilson would recommend people to the Dunes for credit and arrange for them to travel to Las Vegas. Upon arrival in Las Vegas these individuals would use their credit to obtain chips. After gambling with a portion of these chips they would deliver the balance to appellants. Appellants would then arrange to have other individuals cash in the chips.

Zvi Hager, one of the government's primary witnesses, participated in appellants' fraudulent scheme. He testified that on three different occasions he worked in Las Vegas for appellants, cashing in large amounts of chips. Hager estimated that he cashed in approximately $750,000 in chips on these trips.

Appendix A

Zvi Hager's motives for testifying against appellants were fully developed at trial. He admitted, for example, that he was anxious to get revenge against appellants for an incident that occurred in 1985.[1] It also was developed at trial that Hager had told Wilson that he would not come to court if Wilson would pay him $30,000.

The defense subpoenaed Rabbi and Baruch Hager, father and brother of Zvi. Both allegedly had attempted to extort money from appellants. Rabbi Hager had approached Thomas Drost, Chief of Security at the Dunes, in May 1985. After meeting with the three, Drost concluded that the April 1983 junket organized by Wilson was part of a scheme to defraud the Dunes. Two years earlier, however, after some investigation he had concluded just the opposite. What the Hager would have testified to at trial is unknown.

When Rabbi and Baruch Hager did not appear on the first day of trial a bench warrant for their arrest was issued. On the fourth day of trial, defense counsel asked if the arrest warrants had been forwarded to New York where the Hagers lived. When the court indicated it was not aware of any problem, defense counsel told the court they would check on the situation and keep the court informed of any problems. Apparently the marshal and the local FBI office between them dropped the ball, neither making any effort to execute the warrants.

On the final day of trial, almost a week later, appellants attempted to recall Zvi Hager as a defense witness. The court sustained the government's objection to the recall. Since Rabbi and Baruch Hager had still not been brought to court, the court offered to consider continuing the trial until the warrants were executed. Appellants

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[1] Hager contends appellants beat him and left him naked on the side of the road in Secaucus, New Jersey.

declined and rested their case. Later that same day, however, appellants moved for a continuance or, in the alternative, for a missing witness instruction. The district court denied both requests.

II. DISCUSSION

A. Appellant's sixth amendment rights were not violated.

The bench warrants issued to obtain the appearance of Rabbi and Baruch Hager were never executed and the government has been unable to explain why. Appellants contend that their sixth amendment rights were violated when the district court denied their request for a continuance to secure the attendance of the missing witnesses. The district court's decision to deny the continuance is reviewed for an abuse of discretion. *United States v. Sterling*, 742 F.2d 521, 527 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985). When requesting a continuance to secure the presence of witnesses a defendant "must show who they are, what their testimony will be, that the testimony will be competent and relevant, that the witnesses can probably be obtained if the continuance is granted, and [that] due diligence has been used to obtain their attendance on the day set for trial." *United States v. Hoyos*, 573 F.2d 1111, 1114 (9th Cir. 1978) (quotation omitted).

We are troubled by the fact that the bench warrants were never executed in this case. The Hagers were hostile witnesses whose presence could not be secured without the government's assistance. Since appellants could not secure the cooperation of the witnesses, it was understandably difficult for them to make a clear showing as to the content, competence and relevance of the testimony, and we would be inclined to afford some latitude in that respect. We need not decide the issue on that basis, however, because appellants clearly failed to use due diligence in obtaining the Hagers' presence.

For that reason we conclude that the district court did not abuse its discretion in denying appellants' request for a continuance.

The record reveals that appellants assumed the burden of keeping the court informed of any problems with the warrants and failed to do so. They should have pressed for execution of the warrants days earlier and asked the court for help in the face of the marshal's inaction. Furthermore, they chose to rest their case when the court offered to consider granting a continuance. The district court did not abuse its discretion by denying the motion for a continuance as untimely given appellants' own failure to act diligently to ensure the presence of the witnesses.

B. The court did not err by refusing to recall Zvi Hager as a defense witness.

The district court did not permit appellants to recall Zvi Hager as a defense witness. Appellants contend that this ruling violated their sixth amendment rights. They argue that they should have been permitted to develop further evidence of Zvi Hager's bias and question him regarding the Hager family's interview with investigator Drost.

We review the district court's decision to limit further cross-examination of Zvi Hager for an abuse of discretion. *United States v. Simtob*, 901 F.2d 799, 804 (9th Cir. 1990). The district court did not abuse its discretion by barring further cross-examination. Zvi Hager's bias against the appellants was thoroughly developed and his character completely impeached during his initial testimony. *See United States v. DeRosa*, 670 F.2d 889, 896 (9th Cir.), *cert. denied*, 459 U.S. 993 *and* 459 U.S. 1-014 (1982).

We also reject appellants' assertion that the district court's ruling prevented them from developing their defense through testimony they could have elicited from Zvi Hager regarding the Drost

interview. In arguing for Zvi Hager's recall, appellants made only a passing reference to the Drost interview and made it patently clear that they intended to focus on impeaching Zvi Hager.[2] Under these circumstances the district court did not err by refusing to recall the witness.

C. The district court did not err when it excluded evidence of a 1978 fraudulent scheme which originated in the New York junket office.

Thomas Drost, the investigator for the Dunes Hotel, conducted an investigation of a 1978 Las Vegas junket known as the Perfetti junket. This investigation implicated Mr. Weintraub, a supervisor of the hotel's New York junket office, in a scheme to defraud the Dunes. Members of the Perfetti junket reported that they had paid money to Weintraub that was never reported to the Dunes. Appellants contend that this information was relevant to show that Mr. Weintraub rather than the plaintiffs might have been behind the fraudulent junkets at issue in this case. The court ruled that this information was collateral and irrelevant.

The district court's determination of relevancy is reviewed for an abuse of discretion. *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir.), *cert. denied*, 454 U.S. 830 *and* 454 U.S. 847 (1981). The district court's determination that a connection between the two junkets was a necessary predicate to the admission of this evidence was not erroneous. *See United States v. Monks*, 774 F.2d 945, 954 (9th Cir. 1985) (court did not abuse its discretion by finding

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[2] A relevant portion of the trial transcript read as follows:
THE COURT: That's not a substantive thing. That's an impeachment question.
MR. TERRY: Well, almost everything that we have is in reference to impeachment, your Honor.
RT-VII-18.

testimony that a third person had engaged in earlier criminal activity to be irrelevant when no evidence connected that third person with the criminal conduct at issue).

D. The hotel's business records were properly admitted by the district court.

Appellants assert that the district court erred by allowing into evidence two types of Dunes business records. First, the district court admitted Dunes credit records which detailed the credit history and reference sources for customers seeking credit at the Dunes. The records originated in the hotel's New York junket office. The specific cards admitted at trial reflected that appellant Wilson recommended approximately fifteen individuals to the Dunes for credit. Second, the district court admitted records which reflected these individuals' credit transactions and gambling activities within the hotel when they came to Las Vegas. The government established that all of these records were prepared in the ordinary course of business by hotel employees.

1. The New York records.

Appellants argue that the cards originating in the New York office were so inherently unreliable that they should not have been admitted under the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6). Since an objection on this ground was not made we will review the district court's decision only if it rose to the level of plain error. *United States v. Hurt*, 795 F.2d 765, 773 (9th Cir. 1986), *amended* 808 F.2d 707 (1987), *cert. denied*, 484 U.S. 816 (1987).

Appellants assert that the credit records were unreliable because Weintraub, the supervisor of the Dunes' New York junket office, was suspended from all promotion and credit activities in May 1983. Evidence was presented, however, which weakens appellants'

argument that the records were unreliable. Michael Hessling, the vice-president of casino operations at the resort, testified that Weintraub's authority to recommend people to the Dunes for credit and to collect on outstanding credit was reinstated in July 1983. Ms. Anderson, a credit manager at the Dunes, testified that the Dunes relied on the credit applications received from the New York office. No evidence suggests these records were tampered with or were other than what they purported to be. We find no plain error in their admission.

2. The Las Vegas records.

Appellants assert that the records detailing the credit transactions and playing habits of those individuals Wilson recommended for credit were irrelevant and inherently prejudicial. Appellants also contend that their admission violated the sixth amendment's confrontation clause. We reject these arguments.

We review the district court's relevancy determinations for abuse of discretion. *United States v. Burreson*, 643 F.2d at 1349. The player records showed that individuals who obtained credit at the Dunes through Wilson's recommendations took out their credit in the form of chips and, with few exceptions, did not repay the casino. The records also showed that these individuals left the playing area with unused chips. This evidence supported the government's theory of conspiracy among the Wilson-recommended players, and was therefore relevant. Fed. R. Evid. 401.

We review for abuse of discretion the court's determination that the probative value of these records was not substantially outweighed by their prejudicial effect. *United States v. Rubio*, 727 F.2d 786, 798 (9th Cir. 1983). We reject appellants' assertion that the records were unfairly prejudicial. They have not shown prejudice which goes beyond the tendency the records had "to make a fact in

issue more or less probable." *United States v. Johnson*, 820 F.2d 1065, 1069 (9th Cir. 1987).

Appellants also assert that the introduction of the records violated the confrontation clause. This circuit has held that the admission of records pursuant to the business records exception to the hearsay rule does not violate the sixth amendment. *United States v. Miller*, 830 F.2d 1073, 1077 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988).

E. The district court properly excluded documents related to Zvi Hager's claims against the Dunes Hotel.

On one of Zvi Hager's trips the Dunes Hotel refused to return $32,000 in chips that he had on deposit with the hotel, nor would the hotel cash out approximately $6,000 of chips he had in his possession. This decision was based on a Dunes executive's determination that Hager had not gambled enough to justify such large amounts of chips. Hager returned to New York and appellant Wilson obtained counsel on Hager's behalf in order to secure the return of that money. The Dunes eventually settled the suit and forwarded a check to New York. Hager testified that he signed the check over to Wilson.

Appellant's claim that the district court erred by excluding Hager's sworn creditor's bankruptcy claim filed in the Dunes Hotel's bankruptcy proceedings and a letter written by Hager to the New York Bar Association. They argue that this evidence was relevant to show that Hager gambled with his own money in Las Vegas and was not working for appellants.

The district court excluded the bankruptcy claim, ruling that it was extrinsic impeachment evidence inadmissable under Fed. R. Evid. 608(b). It also found that it simply would waste time and confuse the jury. Fed. R. Evid. 403. We do not undertake a Rule

608(b) analysis because we find that the court's determination under Rule 403 was not erroneous. *See United States v. Miller*, 830 F.2d 1255, 1266 (9th Cir. 1989) (court did not err by excluding evidence that may have been relevant to establish bias when relevance is outweighed by potential for confusion and wasting of court's time).

The bankruptcy claim was made up of two parts. The first consisted of a bankruptcy Proof of Claim against the Dunes for $53,036.00. The second part consisted of attachments which described appellants' conspiracy against the Dunes and Hager's role in it. These allegations were consistent with Zvi Hager's testimony at trial. The claim was denied on the grounds that Hager's interest in the monies was illegally obtained. Since the claim and the attached documents contradict one another and the claim was denied by the bankruptcy court, the exhibit was essentially worthless. The court did not abuse its discretion by excluding it under Rule 403.

Appellants also contend that a letter of complaint sent by Zvi Hager to the New York Bar Association was also improperly excluded. This letter alleged that Mr. Bertram Zweibon had successfully collected $32,200.00 on Hager's behalf and that Hager had never received the money. The district court found that the claim was inadmissable under Fed. R. Evid. 608(b).

The record reveals that appellants attempted to use the letter solely to impeach Hager's credibility. The district court excluded it as extrinsic evidence pursuant to Fed. R. Evid. 608(b). Appellants claim on appeal, that the letter should not have been excluded under Rule 608(b) because it went to a material issue in the case, was not raised at trial; accordingly we review only for plain error. *United States v. Hurt*, 795 F.2d at 773. The letter did not contend that Hager had used his own funds in Las Vegas. It is therefore not relevant to prove appellants' theory that Hager used his own funds. No plain error occurred.

F. The evidence was sufficient to support the jury's judgment.

Appellants contend that the evidence is not sufficient to sustain their convictions. We review this claim by considering whether a rational jury, taking the evidence in the light most favorable to the government, could have found the essential elements of the crime to exist beyond a reasonable doubt. *United States v. Marabelles*, 724 F.2d 1374, 1377 (9th Cir. 1984).

Appellants assert that the evidence is insufficient to support a finding that they intended to defraud the Dunes Hotel, a common element of all the offenses of which they were convicted. 18 U.S.C. §§ 371, 1341-1342. We reject this contention. The testimony by Green and Hager established that appellants operated a scheme to defraud the Dunes Hotel. According to their testimony Wilson recommended people to the Dunes for credit and convinced these individuals to use this credit to obtain large numbers of chips. These chips were then transferred to Wilson who arranged to have them returned for cash by a different individual so that the Dunes was unable to apply the chips to the proper credit line. Appellants' assertion that no fraudulent intent may be inferred from these actions ignores the fact that the evidence must be viewed in the light most favorable to the government. We find ample support in the record for the verdicts.

AFFIRMED.

Supreme Court, U.S.
FILED
JUN 24 1991
OFFICE OF THE CLERK

(2)

No. 90-1631

In the Supreme Court of the United States

OCTOBER TERM, 1990

MURRAY WILSON AND SAM WATENSTEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' Sixth Amendment right to compulsory process was violated by the district court's failure to execute bench warrants for defense witnesses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but the decision is noted at 924 F.2d 1064 (Table).

JURISDICTION

The judgment of the court of appeals was filed on January 29, 1991. The petition for certiorari was filed on April 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of con-

spiracy to commit wire fraud and mail fraud, in violation of 18 U.S.C. 371; wire fraud, in violation of 18 U.S.C. 1343; and mail fraud, in violation of 18 U.S.C. 1341. Wilson was sentenced to three years' imprisonment, to be followed by five years' supervised release, and fined $10,000. Watenstein was sentenced to 18 months' imprisonment, to be followed by five years' probation. The court of appeals affirmed. Pet. App. 1a-11a.

1. The evidence at trial showed that petitioners defrauded the Dunes Hotel and Country Club in Las Vegas by manipulating the hotel's credit policies. In 1983, Wilson recommended individuals to the Dunes for credit and arranged for them to travel to Las Vegas. Upon their arrival in Las Vegas, the individuals used their credit to buy gambling chips at the Dunes. After gambling with a portion of the chips, they delivered the balance to petitioners, who then gave the chips to someone else to cash. The loans represented by the chips were never repaid. Pet. App. 2a.

2. Zvi Hagar, one of the government's principal witnesses at trial, testified that he made three trips to Las Vegas at petitioners' behest and that he cashed approximately $750,000 in gambling chips on those trips. Hagar admitted at trial that he wanted to take revenge on petitioners for an incident in New Jersey in 1985 during which Hagar claimed that petitioners beat him and left him naked on the side of the road. Hagar also admitted that he had told Wilson that he would not testify if Wilson paid him $30,000. Pet. App. 2a-3a.

At the start of trial, petitioners' counsel informed the court that petitioners had subpoenaed Rabbi Solomon Hagar and Baruch Hagar, Zvi Hagar's father and brother, to testify at trial, but that they had not appeared. Petitioners asked the court to issue arrest warrants for both individuals, and the court complied. Pet. App. 3a; Gov't C.A. Br. 9. On the fourth day of trial, defense counsel asked if the

arrest warrants had been forwarded to New York where the Hagars resided. The court stated that it did not know if the warrants had been forwarded and asked petitioner Watenstein's counsel to check on their status. Gov't C.A. Br. 11. Watenstein's counsel agreed to check on the situation and inform the court if there were any problems. Pet. App. 3a; Gov't C.A. Br. 11.

Almost a week later, on the final day of trial, Solomon and Baruch Hagar still had not appeared. The district court offered to continue the trial until the arrest warrants were executed. Petitioners declined the offer of a continuance and instead rested their case. Later that day, however, petitioners moved for a continuance or, in the alternative, for a missing witness instruction. Watenstein's counsel told the court that he had learned from the United States Marshals Service that it had done nothing to execute the warrants because the Marshals Service believed that executing the warrants was the FBI's responsibility. The district court concluded that the Hagars' testimony would be irrelevant or cumulative. Accordingly, it denied petitioners' requests for a continuance or a missing witness instruction. Pet. App. 3a-4a; Gov't C.A. Br. 11-12.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioners' claim that their Sixth Amendment rights had been violated by the district court's refusal to grant a continuance to secure the appearance of Solomon and Baruch Hagar at trial. Although the court was "troubled by the fact that the bench warrants were never executed in this case," it held that the district court had not abused its discretion by denying the continuance because petitioners "clearly failed to use due diligence in obtaining the Hagars' presence." *Id.* at 4a-5a. The court noted that petitioners "assumed the burden of keeping the court informed of any problems with the warrants and failed to do so" and that petitioners "should have pressed for execution of the

warrants days earlier." *Id.* at 5a. Finally, the court observed that petitioners chose to rest their case when the district court offered to grant a continuance. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 10-16) that their Sixth Amendment rights were violated by the failure to execute the bench warrants and obtain the Hagars' appearance at trial. This fact-bound claim warrants no further review.

The Sixth Amendment's Compulsory Process Clause gives "criminal defendants * * * the right to the government's assistance in compelling the attendance of favorable witnesses at trial." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 56 (1987). The right to compulsory process "is dependent entirely on the defendant's initiative." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). Indeed, "[t]he very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." *Ibid.* Moreover, this Court has recognized that the Compulsory Process Clause "is a weapon that cannot be used irresponsibly," *ibid.*, and that "[i]n the exercise of [the right to present witnesses], the accused, as is required of the State, must comply with established rules of procedure and evidence." *Id.* at 411 n.15 (quoting *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973)). It follows that the right to compulsory process, like other constitutional rights, may be waived if it is not asserted. See, *e.g.*, *United States* v. *Gagnon*, 470 U.S. 522, 528 (1985) (defendants forfeited right to be present at conference with juror by not asking to be present); *Levine* v. *United States*, 362 U.S. 610 (1960) (defendant forfeited any due process right to a public trial by not asking the district court to open the courtroom).

In this case, petitioners failed to discharge the duty of affirmative conduct imposed by the Compulsory Process

Clause. Petitioners informed the court, through counsel, that they would check to make sure the arrest warrants had been executed and would inform the court if any problem arose. Petitioners then failed to investigate in a timely fashion. They waited almost a week, until the last day of trial, to inform the court that the warrants had not been executed. Moreover, petitioners' decision to reject the district court's offer of a continuance and rest their case waived their rights under the Compulsory Process Clause.

Even if petitioners had preserved their right to complain about the government's failure to execute the arrest warrants, that claim would lack merit. This Court has made clear that "more than the mere absence of testimony is necessary to establish a violation of the right" to compulsory process. *United States* v. *Valenzuela-Bernal*, 458 U.S 858, 867 (1982). A defendant must show that witnesses whose presence he has been unable to obtain "would have been both material and favorable to his defense." *Ibid.* See also *Washington* v. *Texas*, 388 U.S. 14, 16 (1967) (testimony must be "relevant and material, and * * * vital to the defense").

Here, the district court concluded that the Hagars' testimony would have been irrelevant or cumulative. Zvi Hagar's bias against petitioners was fully brought out at trial. Thus, to the extent that petitioners sought to impeach Zvi Hagar's testimony through his brother and father, the district court reasonably concluded that Solomon and Baruch Hagar's testimony would have been cumulative. Petitioners assert (Pet. 4) that they sought to show that the Hagars had attempted to extort money from them in the past, and had conspired to frame petitioners for the offenses charged in the indictment. But petitioners made no showing that the Hagars would have so testified. The district court was therefore correct in concluding that the absence

of the Hagars as witnesses at trial did not prejudice petitioners' defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20600